Nos. 88-1075 and 88-1494

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ASSOCIATED BUILDERS AND CONTRACTORS, INC., *et al.*,
Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*,
Respondents.

ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,
Petitioners,

v.

UNITED STEELWORKERS OF AMERICA, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC AND BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO IN OPPOSITION

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QUESTION PRESENTED

The petitions take issue with the Third Circuit's ruling that "information collection requests" subject to approval by the Office of Management and Budget under the Paperwork Reduction Act do not include regulations under which information is to be provided only to private parties rather than to government agencies. The question presented is whether that ruling—which is not in conflict with that of any other circuit and which concerns a subject that is extremely unlikely to be the subject of litigation—is worthy of review in a case in which its resolution would not affect the judgment below.

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Respondents United Steelworkers of America, AFL-CIO, CLC ("USWA") and Building and Construction Trades Department, AFL-CIO ("BCTD") submit this brief in opposition to the petitions for certiorari in Nos. 88-1075 and 88-1434, which seek review of the decision

in *United Steelworkers of America v. Pendergrass*, 855 F.2d 108 (3d Cir. 1988).[1]

STATUTES INVOLVED

In addition to the sections of the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 *et seq.* ("PRA") which are reproduced in the Petition in No. 88-1434 at 1-3, this case also involves § 3504(a) of the PRA, 44 U.S.C. § 3504(a), which provides as follows:

> The Director shall develop and implement Federal information policies, principles, standards, and guidelines and shall provide direction and oversee the review and approval of information collection requests, the reduction of the paperwork burden, Federal statistical activities, records management activities, privacy and security of records, agency sharing and dissemination of information, and acquisition and use of automatic data processes, telecommunications, and other information technology for managing information resources. The authority of the Director under this section shall be exercised consistent with applicable law.

The case involves as well the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("OSH Act"), and particularly §§ 6(b)(5) and 6(b)(7), 29 U.S.C.

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[1] The petition of Associated Builders and Contractors ("ABC") also seeks review of the decision in *Associated Builders and Contractors v. Brock*, 862 F.2d 63 (3d Cir. 1988). Review of the latter decision is sought as well by other industry petitioners in Nos. 88-1070 and 88-1385.

USWA and BCTD have today filed a brief in opposition in Nos. 88-1070, 88-1075 and 88-1385, which demonstrates that further review of the decision in *Associated Builders and Contractors v. Brock* is not warranted. That would remain the case even if, contrary to our submission, the Court were to grant certiorari to review the decision in *United Steelworkers of America v. Pendergrass*. Although the two cases grow out of the same OSHA Standard, the legal issues presented in each are completely distinct.

§§ 655(b)(5) and (7). Those sections provide in pertinent part as follows:

Section 6(b)(5):

> The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

Section 6(b)(7):

> Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure.
>
> • • • •
>
> The Secretary, in consultation with the Secretary of Health and Human Services, may by rule promulgated pursuant to section 553 of Title 5, make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning, monitoring or measuring, and medical exami-

nations, as may be warranted by experience, information, or medical or technical developments acquired subsequent to the promulgation of the relevant standard.

STATEMENT

1. History and Provisions of the Hazard Communication Standard

In November 1983 the Occupational Safety and Health Administration ("OSHA") promulgated a Hazard Communication Standard ("the Standard" or "HCS"). The Standard is based on OHSA's determination that lack of knowledge on the part of employees regarding the chemical hazards the employees confront on the job is one of the prime causes of occupational illness and injury. *See* 48 Fed. Reg. 53282-84, 53321 (1983); 52 Fed. Reg. 31853, 31868-69 (1987).[2]

[2] The Standard requires chemical manufacturers and importers to evaluate chemicals they produce and import to determine if they are hazardous. 29 C.F.R. § 1910.1200(d)(1). For each chemical determined to be hazardous, a material safety data sheet ("MSDS") must be developed and provided to employers, § 1910.1200(g)(1), (6); and containers of hazardous chemicals must be labeled by the manufacturer or importer with the chemical's identity and appropriate hazard warnings. § 1910.1200(f)(1).

With respect to so-called "downstream" employers—*i.e.*, employers other than chemical manufacturers, importers and distributors—the HCS imposes much less extensive obligations. Those employers are required in essence to transmit to their employees the information already produced and compiled by the chemical manufacturers and importers. Thus, these employers must (1) maintain copies of the MSDSs they receive, and make them accessible to employees at the worksite, § 1910.1200(g)(8); (2) see to it that containers of hazardous chemicals in the workplace are labeled with information corresponding to that provided on the labels arriving from the chemical manufacturers and importers, § 1910.1200(f)(5); (3) provide employees with information and training on hazardous chemicals, § 1910.1200(h); and (4) develop and maintain a written hazard communication program that describes how the employer will meet the requirements described above, § 1910.1200(e)(1).

The Office of Management and Budget (OMB), purporting to act under the authority of the Paperwork Reduction Act (PRA), reviewed the provisions of the 1983 Standard and approved them without exception. *See* 48 Fed. Reg. 53280 (1983).

The 1983 Standard covered only chemical manufacturers, importers and distributors, and employers in the manufacturing sector of the economy as defined by Standard Industrial Classification (SIC) Codes 20 through 39. On petitions for review of the Standard filed in the Third Circuit, that court held, *inter alia*, that OSHA's rationale for confining the Standard to the manufacturing sector was legally invalid, and the Secretary was directed "to reconsider the application of the standard to employees in other sectors and to order its application to other sectors unless he can state reasons why such application would not be feasible." *United Steelworkers of America v. Auchter*, 763 F.2d 728 (3d Cir. 1985) (*"USWA I"*). When OSHA delayed in carrying out that mandate, the Third Circuit issued a second decision directing the Agency to act on the basis of the original rulemaking record and to complete its reconsideration within sixty additional days. *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263 (3d Cir. 1987) (*USWA II*).

Subsequently, on August 24, 1987, OSHA promulgated the revised Standard, extending the coverage of the HCS to all employers covered by the Act. 52 Fed. Reg. 31852-86 (1987). With three modifications that are pertinent here, the substantive provisions of the revised HCS are the same as those approved by OMB in 1983; those provisions simply apply now to all employers, rather than only those engaged in manufacturing.

The three modifications are as follows. First, the revised Standard includes a new provision dealing with multi-employer worksites, which provides that if circumstances are such that the employees of one employer may

be exposed to hazardous chemicals produced, used or stored by another employer on the site, the latter must either provide copies of the MSDSs for those chemicals to the other employer, "or . . . make [the MSDSs] available at a central location in the workplace." § 1910.1200 (e) (2). Second, OSHA added a provision exempting from the coverage of the HCS any drug that is "in solid, final form for direct administration to the patient." § 1910.1200 (b) (6) (viii). Third, OSHA added an exclusion for any "consumer product," as defined in the Consumer Product Safety Act, "where the employer can demonstrate it is used in the workplace in the same manner as normal consumer use, and which use results in a duration and frequency of exposure which is not greater than exposures experienced by consumers." § 1910.1200 (b) (6) (vii).

2. OMB's Disapproval of Three Provisions of the Standard

On September 10, 1987, OSHA submitted the revised Standard to OMB for review. On October 23 the Department of Labor was notified that OMB disapproved the three new provisions just described.

With respect to the provision requiring employers at multi-employer worksites to exchange MSDSs in certain circumstances, OMB devoted most of its discussion to comments that had been made by industry groups regarding the alleged difficulty of complying with this provision, *see* Pet. App. at 30a-32a, including, for example, a complaint that "a minimum of several file cabinets would be required . . . ." *Id.* at 32a. OMB asserted that OSHA had not "demonstrate[d] the practical utility for th[is] requirement," *id.*, and opined that "the requirement does not appear to be the least burdensome necessary for the efficient transmittal of hazard information in multi-employer workplaces," *id.*

With respect to the exclusion of certain drugs, OMB's objection related only to employers "[o]utside the manufacturing sector." Pet. App. at 37a. As to those employers, OMB asserted that OSHA "does not explain why all drugs regulated by the FDA are not exempted . . . , *id.*; and OMB expressed the view that "coverage of any FDA-regulated drug would result in duplicative paperwork and is unlikely to provide additional information of any practical utility," *id.*

With respect to consumer products, OMB declared it was not enough for OSHA to exclude from the HCS products that are used in the workplace in the same manner, and with the same duration and frequency of exposure, as the products are used by consumers; OMB insisted that OSHA should "exempt any substance packaged in the same form and concentration as a consumer product *whether or not it is used for the same purpose as the consumer product.*" Pet. App. at 36a (emphasis added). OMB justified its approach largely on the ground that it would simplify the compliance tasks of employers. *Id.* at 34a-36a.

In the wake of OMB's action USWA and Public Citizen, Inc. filed in the Third Circuit a "Motion for Further Relief With Respect to Prior Decisions of This Court," urging that the Secretary of Labor and the Director of OMB be "enjoin[ed] . . . from taking any further action in derogation of the [Third Circuit's] orders in [*USWA I* and *II*]," and urging that the Secretary and the Director be held in civil contempt.

3. OSHA's Rejection of OMB's Conclusions

While that motion was *sub judice* OSHA published a Notice of Proposed Rulemaking in which, *inter alia*, the Agency solicited public comment on OMB's critique of the three provisions of the HCS at issue. *See* 53 Fed. Reg. 29822-56 (1988). Without explicitly rejecting OMB's views, OSHA explained in detail the justifications

for each of the three provisions OMB had disapproved, and proposed that no changes be made in the provisions notwithstanding OMB's views.

With respect to multi-employer worksites, OSHA noted that several participants in the rulemaking, including construction industry employer associations, had emphasized the importance and feasibility of making MSDSs available at the workplace for *all* hazardous chemicals to which an employee may be exposed, whether the chemical is brought to the site by his own employer or by another employer. *Id.* at 29843-44. The Agency further noted that its Advisory Committee on Construction Safety and Health had reviewed the multi-employer worksite provision as promulgated by OSHA, and had raised no objections to "the provision for MSDSs to be made available on multi-employer worksites." *Id.* at 29844. OSHA stated that the Agency "still believes that the multi-employer worksite provision is critical to the proper functioning of the rule, and that MSDSs are necessary to ensure that proper information is available to both employers and employees." *Id.* at 29845.[3] However, the Agency invited further comment on this issue and on "OMB's suggested approach." *Id.*

With respect to the scope of the exclusion of drugs, OSHA noted that the exclusion the Agency had originally fashioned (covering all drugs in solid form) is quite broad, *id.* at 29838-39, and that other drugs were not excluded "in recognition of the fact that there are various types of workers who may be exposed to drugs in hospitals or pharmacies," *id.* at 29839, and "since drugs are designed to be biologically active, OSHA wants to ensure that employees will be properly protected." *Id.* OSHA cited recent experience reported by the American Industrial Hygiene Association confirming that exposure

[3] Although OMB had suggested that labels and training could substitute for MSDSs, *see* Pet. App. at 32a; Pet. at 25 n.15, OSHA cited testimony establishing that such is not the case. 53 Fed. Reg. 29844.

of health care employees to drugs that are not in solid form can indeed cause serious occupational health problems. *Id.* Accordingly, although OSHA proposed one modification of the provisions of the Standard with respect to drugs,[4] the Agency did not propose to adopt OMB's approach of "totally exempting all drugs from any coverage under the rule in terms of the non-manufacturing sector workplaces," but did invite comment on this suggestion. *Id.* at 29839.

With respect to consumer products, OSHA explained in detail (i) that the labels and inserts provided with consumer products generally do not include the kind of hazard information that is needed when the product is used in an occupational setting, and (ii) that so-called "consumer products" are responsible for an extremely large number of occupational illnesses and injuries. *Id.* at 29834-35. The Agency observed that the rulemaking record had conclusively established those points. *Id.* at 29835-36. OSHA reiterated that this is why the Standard provides an exemption "tied to type and extent of exposure," *id.* at 29836, which "strikes a balance between the practical considerations of acquiring and maintaining material safety data sheets on CPSC regulated products . . . , and the worker's need for more hazard information than a CPSC label when exposures are greater or more frequent than typical public use of the chemical would generate." *Id.*, quoting 52 Fed. Reg. 31863. OSHA therefore did not propose any change in the consumer product exemption as originally promulgated, but again invited comment on OMB's contrary view. *Id.* at 29838.

4. The Decisions Below

Thereafter, on August 19, 1988, the Court of Appeals granted USWA and Public Citizen's motion for further relief in part, holding that "[w]ithdrawal of the provisions disapproved by OMB was . . . inconsistent with [the

[4] The proposal would allow certain FDA-approved documents to be considered MSDSs for purposes of the HCS. *Id.* at 29839.

Third Circuit's] orders [in *USWA I* and *II*]," Pet. App. at 12a-13a, and directing the Secretary to publish forthwith a notice that the three provisions disapproved by OMB "are now effective." Pet. App. at 13a. The court declined, however, to hold the agency officials in contempt. *Id.*

In its opinion the Third Circuit determined that OMB's action is not justified by the PRA. In reaching that result the court relied on *two independent grounds*, Pet. App. at 8a: *first*, that the provisions of the HCS at issue do not constitute "information collection requests" within the meaning of 44 U.S.C. §§ 3504(c)(1) and (2), and therefore are not subject to OMB review and approval; and *second*, that OMB's action is foreclosed by 44 U.S.C. § 3518(e), which provides that the PRA does not increase OMB's authority "with respect to the substantive policies and programs of . . . agencies . . . ," and 44 U.S.C. § 3504(a), which provides that OMB's authority "shall be exercised consistent with applicable law." *See* Pet. App. at 8a-11a.

ARGUMENT

The Government's petition testifies to the raw force the Budget Bureau brings to getting its way, right or wrong, within the Executive Branch and the inability of the Cabinet-level Departments to temper OMB's will for power with more mature and balanced professional judgments. As we now show, measured by the established criteria for invoking this Court's jurisdiction, this is a *certiorari* petition that should never have been filed and that should be denied.[5]

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[5] The ABC *certiorari* petition in No. 88-1075, which, as we noted at the outset, also covers questions raised in a companion case below, makes essentially the same points as the Government's petition in No. 88-1434 and does so without diverging from, or adding to, the Government's arguments. For simplicity's sake, we have therefore organized our response around the Government's papers. Unless otherwise noted, references to "Pet." and "Pet. App." are to the petition in No. 88-1434 and the appendix to that petition.

1. The question on which the Government concentrates its attention—the meaning of the term "information collection request" in the Paperwork Reduction Act (PRA)—is presented only indirectly and as the result of an idiosyncratic proceeding quite unlikely to be replicated. Moreover, the meaning of that term is not determinative of any substantive issue between the parties to this case; the decision below rests on multiple, alternative grounds and the Government does not come close to showing that these alternative bases are in any way infirm.

(a) As the Government's petition recognizes, "[t]he specific issue before the [Third Circuit] was whether the Secretary [of Labor] had complied with the court's previous order requiring the Secretary to extend a hazard communication standard to the non-manufacturing sector." Pet. at 20. And, the Third Circuit's ultimate determination was that "[w]ithdrawal of the provisions disapproved by OMB was . . . inconsistent with th[at] order[]." Pet. App. at 12a-13a.

That determination rests *primarily* on the Third Circuit's construction of its own prior orders and on that court's judgment of what was required of the Secretary of Labor in the way of compliance after a long drawn out proceeding that had twice before resulted in judicial proceedings, and only *secondarily* on the Third Circuit's views concerning OMB's authority under the PRA.

Indeed, except in the truly extraordinary context presented here, it is unlikely in the extreme that the PRA will ever generate any legal controversy, much less a recurring controversy, requiring this Court's intervention. In the normal course, OMB review of "paperwork" requirements under the PRA begins *when a notice of proposed rulemaking is published.* The PRA provides that agencies are to give OMB notice of such proposed rulemaking, and that OMB must file public comments in response to the notice or lose all authority to disapprove any provisions of the proposed regulation. 44 U.S.C. § 3505(h)(4). If public comments on the proposal are

submitted, *see* 44 U.S.C. § 3505(h)(1), (2), OMB may then disapprove a provision of the agency's final rule only "if the agency's response to [OMB's] comments . . . was *unreasonable*." 44 U.S.C. § 3505(h)(5)(C) (emphasis added).

To put this in concrete terms, if the statements in OMB's decision disapproving the three provisions at issue here had been submitted as comments on a proposed rule, and if OSHA had rejected OMB's suggestions for the reasons that OSHA has now expressed in the August 1988 Federal Register statement discussed *supra* at 7-9, OSHA's position could not be characterized as "unreasonable," and OMB would therefore have had no right under the PRA to disapprove OSHA's decision. That this sequence of events did not occur here is due solely to the unique procedural posture of this rulemaking. *See supra* at 5. In the ordinary situation, then, the provisions of the PRA itself would have prevented the OMB/OSHA clash that gave rise to the need for a judicial resolution.[6]

(b) While the Government's petition strives to make it appear that this case turns on the proper construction of "information collection request," in fact the Third Circuit also found OMB's action to be invalid on an independent ground: *viz.* that OMB had transgressed the limitations in the PRA requiring OMB to exercise its

[6] The Government's petition asserts that even "[a]pplied only to the specific agency action at issue here, [the decision below] would have substantial consequences: it would eliminate OMB paperwork review of one of the most significant paperwork requirements in regulatory history." Pet. at 17. That is pure hyperbole.

Only three provisions of the HCS are at issue here, and those three provisions hardly constitute "one of the most significant paperwork requirements in regulatory history." What is more, now that OSHA has so thoroughly debunked OMB's objections to those provisions and has slated further rulemaking with respect to those objections, *see supra* at 7-9, it is far from clear that OMB's erroneous views would have had "substantial consequences" in terms of the ultimate content of the HCS even if the Third Circuit's decision had never been written.

authority "consistent with applicable law," 44 U.S.C. § 3504(a), and providing that the PRA "shall not be interpreted as increasing . . . the authority of . . . [OMB] . . . with respect to the substantive policies and programs of . . . agencies. . . .," 44 U.S.C. § 3518(e).

The Government attempts to wish away these restrictions on OMB's authority in a footnote, asserting that "[t]hese provisions simply recognize that an agency retains authority to determine its regulatory objectives, while OMB has a responsibility to review whether the agency has chosen effective information collection methods to *achieve* those objectives." Pet. at 24 n.14 (emphasis in original).

Even if this distinction between "objectives" and "methods" had any operational content, more than the Government's *ipse dixit* would be required to establish the unlikely proposition that when Congress referred to "applicable law" (§ 3504(a)) and "substantive policies and programs" (§ 3518(e)), the Legislature was referring only to regulatory "objectives," and not regulatory "methods."[7] The phrase "policies *and programs*" is most naturally read to include both "objectives" *and* "methods." And once past that ineffectual effort to cut all meaning out of the PRA's limitations on OMB's authority, the Government offers nothing to demonstrate that the decision below is wrong in this regard.

No such demonstration could be made. The OSH Act not only gives *OSHA*, rather than OMB, the authority to

[7] The only decision cited in the Government's petition as mentioning § 3518(e)—and as far as we are aware, the only decision other than this one to discuss any aspect of that provision—is *Action Alliance of Senior Citizens v. Bowen*, 846 F.2d 1449 (D.C. Cir. 1988), *petition for cert. pending* (No. 88-849). *See* Pet. at 28. And that case held only that § 3518(e) does not "completely exempt any civil rights activity from OMB's data collection supervision." *Id.* at 1454-55.

The Government cites *no* other case construing § 3504(a), and as far as we are aware there is no such case.

promulgate occupational safety and health standards,[8] but also specifies in no uncertain terms the manner in which OSHA is to resolve the tension between costs and employee protection in fashioning standards regarding toxic materials and harmful physical agents, and, in particular, in fashioning hazard communication requirements. OMB's action here plainly transgressed those statutory mandates.

As this Court held in *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 509 (1981) (*"ATMI"*):

> [Section] 6(b)(5) directs the Secretary to issue the standard that "most adequately assures . . . that no employee will suffer material impairment of health," limited only by the extent to which this is "capable of being done." In effect then . . . , Congress itself defined the basic relationship between costs and benefits, by placing the "benefit" of worker health above all other considerations save those making attainment of this "benefit" unachievable. Any standard . . . that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in § 6(b)(5).

And, insofar as hazard comunication is concerned, a second provision of the OSH Act, § 6(b)(7), further requires that standards "*shall prescribe* the use of labels or other appropriate forms of warning as are necessary to *insure* that employees are apprised of *all hazards* to which they are exposed, relevant symptoms and appro-

[8] Congress made a considered judgment that the authority to determine the content of occupational safety and health standards should be entrusted to the Secretary of Labor. This was the approach adopted in the bill passed by the Senate. The House bill, on the other hand, called for an independent board to set standards. "The question of the separate standards board was the most controversial issue confronting the Conference Committee; ultimately, the House of Representatives receded and the Senate approach, giving the Secretary of Labor authority to issue occupational safety and health standards, subject to review in the U.S. courts of appeals, was adopted." B. Mintz, *OSHA: History, Law, and Policy* 25-26 (1984).

priate emergency treatment, and *proper conditions and precautions of safe use or exposure.*" 29 U.S.C. § 655(b)(7) (emphasis added).[9]

To put it mildly, there is no indication that OMB sought to adhere to the mandate of § 6(b)(5) that standards must provide the greatest level of protection that is "capable of being done," *ATMI*, *supra*, 452 U.S. at 509, or the mandate of § 6(b)(7) that hazard communication mechanisms must "insure" that employees are apprised of "all hazards" and of "proper conditions and precautions of safe use or exposure." Instead, OMB's chief preoccupation was with industry claims of burden or inconvenience, even at the mundane level of, *e.g.*, the need to obtain file cabinets, *see supra* at 6-7, and with a fetishistic desire to ensure that employers be subject to the requirements promulgated by only one regulatory agency, even where the requirements of that agency do not purport to protect *employees*, *see supra* at 7.

Although this point holds true with respect to OMB's disapproval of each of the three regulatory provisions at issue, it is perhaps most obvious with respect to the coverage of consumer products. OSHA's analysis of OMB's comments on this subject, together with the record evidence, establish that OMB is simply wrong in assuming that the labels prescribed by the Consumer Product Safety Commission provide the kind of information that *employees* need if they are to use a product safely *in industrial settings* and *at industrial levels of exposure*. *See supra* at 9. In particular, to use the words of § 6(b)(7) itself, CPSC labels do not provide information as to "proper conditions and precautions of safe use or exposure" in the industrial setting. *See* 53

[9] The final sentence of § 6(b)(7) also directs OSHA to consult on such matters with "the Secretary of Health and Human Services" (*i.e.*, the National Institute for Occupational Safety and Health, an expert scientific body created by the OSH Act within the Department of Health and Human Services, *see* 29 U.S.C. §§ 669(e), 671). The statute does not provide for any such consultation with OMB.

Fed. Reg. 29834, 29835. OSHA's treatment of consumer products was carefully tailored to address this reality. *See supra* at 6, 9. Yet OMB, with hardly a backward glance, ordered OSHA to exempt from the HCS every "substance packaged in the same form and concentration as a consumer product *whether or not it is used for the same purpose as the consumer product.*" Pet. App. at 36a (emphasis added). It cannot seriously be maintained that this approach is consistent with §§ 6(b)(5) and (7).

Thus, even if the Government were correct that the provisions of the HCS at issue constitute "information collection requests," the Third Circuit's conclusion that OMB's disapproval of those provisions was invalid would be unaffected, because, on the facts of this case, OMB's action improperly interfered with OSHA's "substantive policies and programs" (§ 3518(e)), and was "[in]consistent with applicable law" (§ 3504(a)) as embodied in §§ 6(b)(5) and (7) of the OSH Act.

(c) The Government's main complaint with the decision below is that OMB's authority to review "information collection requests" encompasses not only regulations that require the provision of information *to a government agency*, but also regulations that require the provision of information *solely to private parties*. *See* Pet. at i, 17-19, 22-24, 27-28. But even assuming that to be so, two of the three provisions of the HCS at issue here, and part of the third, are outside the PRA's scope because the provisions do not require the regulated employers to provide any information at all. As the Third Circuit emphasized, these provisions essentially require employers "not to *compile*, but simply to *transmit* information." Pet. App. at 9a (emphasis added).

Thus, the provision regarding multi-employer worksites requires employers to make available to each other the MSDSs the employers have received from chemical manufacturers and importers, and OMB did *not* question the requirements concerning the preparation of MSDSs imposed on manufacturers and importers. The provision

regarding drugs was disapproved only with respect to the non-manufacturing sector, and the HCS does not require employers in that sector to develop information, but only to retain the MSDSs and labels prepared by chemical manufacturers and importers.[10]

The question whether these provisions constitute "information collection requests" within the meaning of the PRA therefore reduces to whether the PRA applies to regulations that merely require a party to *transmit* information *prepared by another*. The Government's petition, however, does not identify this exceedingly narrow technical point of dispute as a Question Presented, *see* Pet. at i, and the petition addresses the matter only in a cryptic footnote which quibbles with the Third Circuit's characterization of the Standard's provisions. *See* Pet. at 22-23, n.11.[11]

The reason for this becoming reticence is that the Third Circuit is plainly correct in recognizing that the PRA does not encompass mere transmittal requirements. OMB itself has stated that "[an] agency's 'obtaining or soliciting of facts or opinions' from the public is the keystone of the definition of 'collection of information.' Some disclosure requirements do not involve any such action." 48 Fed. Reg. 13675 (1983). In OMB's words, "disclosure and labeling requirements are covered [by the PRA]

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[10] Of the three provisions at issue, then, only the provision relating to consumer products involves any requirement relating to the development of information, and then only because OMB disapproved the application of the HCS to consumer products altogether, thus eliminating the obligation of chemical manufacturers and importers to prepare MSDSs and labels for such products. Even there, OMB overreached in striking down the Standard's *training* requirement—which is plainly outside the PRA's scope—insofar as that requirement applies to consumer products.

[11] The Government states, for example, that the multi-employer worksite provision "requires employers to gather and keep records at a specific site." *Id.* This begs the question, because the point is that the records to which the Government refers are MSDSs *prepared by others*.

only to the extent that they implicitly or explicitly require a person to collect information for the purpose of the disclosure or labeling." *Id.* Thus, for example, OMB has acknowledged that the requirement of placing warning labels on cigarette packages does not constitute a collection of information because the persons subject to the requirement do not have to develop the information contained in the warnings, but "need only transmit to the public" information provided by another (in that case, the federal Government). *Id.*

Because the provisions at issue here, with one limited exception, require only transmittal of information prepared by others, those provisions would not constitute "information collection requests" even if the Government were correct in its position on the only question its petition asks this Court to address.

2. Our showing to this point is that the question the Government seeks to present—*viz*, whether the PRA applies to information developed solely for use by private parties, rather than for use by a government agency—is not significant to the proper resolution of even this highly unusual case. We now show that putting that consideration aside the petition should be denied because the Government's position on its question presented is wrong.[12]

[12] We note in passing that there is no conflict in the circuits on this question. The Government's petition cites one decision, *Action Alliance of Senior Citizens v. Bowen*, 846 F.2d 1449 (D.C. Cir. 1988), *pet. for cert. pending* (No. 88-849), which is contended to be "at odds" with the present decision, albeit "not in square conflict," since *Action Alliance* arose under the Federal Reports Act, not the PRA, Pet. at 27-28. But the petition's candor does not go far enough: as the Third Circuit demonstrated, Pet. App. at 9a, the two decisions are not even "at odds." *Action Alliance* involved information required to be collected for the potential use *of the Government, see* 846 F.2d at 1452, 1453, and the D.C. Circuit held only that the PRA is applicable to such an information collection request even where the information has not actually been *delivered* to the Government. *Id.* at 1453-54. But the Standard here requires information to be developed and provided solely for use by employees, not for use by the Government, and as we show in text that is a decisive difference.

We also note that the regulations erroneously described by the Government as "substantially identical" to the HCS, Pet. at 18, all require the development and compilation of information, not merely the transmittal of information prepared by others. The same is true of the disclosure requirements discussed in the legislative history cited in the Petition at 25-26.

The language of the PRA strongly supports the proposition that the statute applies only to information collected for governmental use. "Practical utility," the criterion that guides OMB's determination whether to approve agency rulemaking, *see* 44 U.S.C. § 3508, is defined in the Act as "*the ability of an agency* to use information *it* collects, particularly the capability to process such information in a timely and useful fashion." § 3502(16) (emphasis added).[13] On the other side of the coin, the "burden" of paperwork requirements, which the PRA is intended to "minimize," § 3501(1), is defined as "the time, effort, or financial resources expended by persons to provide information *to a Federal agency*" § 3502(3) (emphasis added). In addition, 44 U.S.C. § 3512, which spells out the consequence of OMB's failure to approve an information collection request, provides that in the absence of such approval "no person shall be subject to any penalty for failing to maintain or provide information *to any agency*" (emphasis added). And the Senate Report accompanying the legislation gives numerous examples of "federal paperwork requirements," every

[13] Under the Act, consideration of "practical utility," as so defined, is part of the determination "whether the collection of information *by an agency* is necessary for the proper *performance of the functions of the agency*. . . ." 44 U.S.C. § 3508 (emphasis added). Thus, the PRA applies only to information collected for use by an agency in the performance of its functions, as distinguished from information which serves to effectuate federal law or policy in some other way. The information generated by the HCS to be provided to employees certainly serves to effectuate the policies of the OSH Act, but the information is *not* used by OSHA for the "performance of [the Agency's] functions."

one of which involves provision of information *to the Government.* S. Rep. No. 930, 96th Cong., 2d Sess. 3-4 (1980).[14]

The Government's petition emphasizes that OMB has published a regulation proclaiming that OMB has authority to review and disapprove agency requirements "that a person 'provide information to another person.'" Pet. at 22, quoting 5 C.F.R. § 1320.7(s). It remains the law, however, that "regulations, in order to be valid, must be consistent with the statute under which they are promulgated." *United States v. Larionoff*, 431 U.S. 864, 873 (1977) (footnote omitted). OMB's views on this subject are certainly not entitled to the fullest measure of deference.[15] "An agency may not finally decide the limits of its statutory power," *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946), and that point applies with special force in this case, where the provision upon which OMB relies, and which OMB promulgated, serves to aggrandize OMB's own jurisdiction and authority.

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[14] None of the legislative history cited by the Government (Pet. at 25-27) or ABC (Pet. at 19) is to the contrary. For example, in discussing SEC disclosure requirements the Senate Report cited by the Government describes the objects of those requirements as "documents *filed with the Securities and Exchange Commission* by issuers of securities . . . ," and the Report states in that connection that the statutory concept of "practical utility" turns on "*whether the agency can use the information* either to carry out its regulatory or other functions or to make it available to the public. . . ." S. Rep. No. 930, *supra*, at 39-40 (emphasis added), quoted in the Government's petition at 26. Thus the discussion of public disclosure in the Report refers to disclosure *by an agency* of documents *filed with it.*

[15] As the statutory provisions cited above indicate, this is not a case where Congress "did not have a specific intention on [the question presented]," *Chevron U.S.C. v. Natural Res. Def. Council*, 467 U.S. 837, 845 (1984), and left a "gap" for OMB to fill, *id.* at 843, quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

CONCLUSION

For the reasons stated, the petitions for certiorari should be denied.

Respectfully submitted,

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